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ZIGLAR V. ABBASI AND ITS EFFECT ON THE CONSTITUTIONAL RIGHTS OF FEDERAL PRISONERS

JULIO PEREYRA*

In June 2017, the Supreme Court decided Ziglar v. Abbasi *and held that prisoners unlawfully detained post-9/11 did not have a* Bivens *claim against policy-level federal executive branch officials and likely had no* Bivens *claim against the wardens at the facility where they were detained. In doing so, the Court drastically altered the analysis for deciding when a* Bivens *claim is new and for determining when a new* Bivens *claim should be either allowed by a court or precluded under a "special factors" analysis. This change in the* Bivens *framework severely restricts the availability of factually novel* Bivens *claims, even those based on constitutional rights whose violation have generally been found to provide a cause of action. The net result is that in many areas,* Bivens *probably no longer serves a deterrence function that is critical in safeguarding constitutional rights. The most notable of these areas is federal prison litigation, where* Bivens *claims against individual officers are necessary for securing a number of rights guaranteed by the Eighth Amendment. Although prisoners subject to Eighth Amendment violations retain some remedies, without* Bivens *the remedial framework is incomplete and insufficient to fully assure constitutional rights. This remedy gap is the result of an unprecedented shift away from the language and logic of previous* Bivens *opinions. While the Court declined to adopt an even more radical retrenchment of* Bivens, *one that would restrict it to the facts of the first three cases adopting the remedy, there is a serious contention that its convoluted formulation of the rules reaches an identical substantive result. Therefore, the result of the* Ziglar *opinion is doubly troubling. Not only has the Court potentially left hundreds of thousands of prisoners with insufficient protection of their rights, but their means of doing so may lack*

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the clarity necessary to create the appropriate response from other institutional actors.

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INTRODUCTION

Money damage remedies in tort law serve two functions. First, they allow victims to be made whole through compensation.[1] Second, they hold tortfeasors liable to deter illegal behavior.[2] In most cases, the deterrent function most clearly expresses the goal of the law. For instance, a law providing money damages for battery more clearly expresses a policy of deterring battery rather than a policy of compensating for the resulting injury. Over time, doctrines such as punitive damages have reified this

[1] DAN B. DOBBS ET AL., THE LAW OF TORTS § 13 (2d ed. 2011).
[2] *Id*. at § 14.

deterrence function to allow victims a direct remedy for money damages.[3] A similar deterrence function has animated the Supreme Court's reasoning in a line of cases dealing with constitutional torts, i.e. claims against federal actors arising directly under the Constitution.[4]

Starting in 1971 with *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[5] the Supreme Court began allowing claims for money damages to be brought directly against officers in order to deter government torts.[6] The Court would then extend the *Bivens* remedy to two other areas: gender discrimination by those not covered by Title VII,[7] and claims by prisoners for violations of their Eighth Amendment rights.[8] These *Bivens* claims have become a necessary mechanism for not only compensating persons whose constitutional rights were violated, but also for ensuring that those rights are not violated in the first place.

Despite their critical role ensuring constitutional rights are respected by federal officers, *Bivens* claims have often not fared well before the Supreme Court. Since 1980, the Supreme Court has never recognized a *Bivens* remedy for a new constitutional provision,[9] and has actually cut back on its availability in the areas where it exists.[10] However, in curtailing *Bivens*, the Court has been careful to ensure that other mechanisms, such as statutory remedies or state tort law, are able to fulfill its deterrent function.[11] By doing so, the Court is able to defer to Congressional action in creating causes of action without sacrificing constitutional rights.[12] Thus, even an overall narrower interpretation of *Bivens* has generally fulfilled its manifest purpose in areas where it is recognized, deterring

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[3] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.").

[4] *See* Corr. Serv. Corp v. Malesko, 534 U.S. 61, 62 (2001).

[5] 403 U.S. 388 (1971).

[6] *See Malesko*, 534 U.S. at 62 ("*Bivens*' purpose is to deter individual federal officers . . . .").

[7] *See* Davis v. Passman, 442 U.S. 228, 247 n.26 (1979).

[8] *See, e.g.*, Farmer v. Brennan, 511 U.S. 825 (1994); Carlson v. Green, 446 U.S. 14, 16 (1980).

[9] Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017) ("These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.").

[10] *See* Minneci v. Pollard, 565 U.S. 118 (2012) (declining to extend a *Bivens* remedy to a claim by a federal prisoner against an officer in a privately operated prison).

[11] *See Malesko*, 534 U.S. at 61 (declining to extend *Bivens* because state tort law provided adequate deterrence).

[12] *Id*. at 71–72.

officers through a direct damage remedy where other mechanisms do not effectively doing so.

Bivens deterrence is most important for claims brought by prisoners for violations of their Eighth Amendment rights. In an area where the Constitution protects the right to be fed, clothed, and kept safe, a set of remedies to ensure these rights will be respected is fundamentally necessary.[13] *Bivens* claims are a critical component of this set of remedies because alternative remedies have either been significantly curtailed,[14] or designed with the presumption that a *Bivens* remedy will be available.[15] These two reasons have made *Bivens* the keystone of the network of remedies that protect federal prisoner rights.

This keystone is likely dislodged with the Court's recent opinion in *Ziglar v. Abbasi*.[16] In *Ziglar*, the Court significantly reworked its approach to *Bivens* in a way that casts significant doubt on the continued ability of federal prisoners to bring *Bivens* claims that differ factually from the original Eighth Amendment *Bivens* case, *Carlson v. Green*, which provides a *Bivens* claim for prisoners who are denied proper medical attention.[17]

Without a direct damage remedy against an offending officer to serve as a deterrent, a host of Eighth Amendment rights are significantly qualified. For instance, negative rights change from the right to be free from a particular form of harm to solely the right to be compensated for it.[18] Positive rights, even if they are able to be secured through an injunction, must be re-litigated every two years.[19] This erosion of Eighth Amendment rights denies more than one 100,000 federal prisoners rights equivalent to those secured to their state counterparts by 42 U.S.C. § 1983.[20]

While *Ziglar* dealt with persons detained in response to a national security crisis, the Court's opinion has widespread ramifications for many

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[13] *See* CTR. FOR CONSTITUTIONAL RIGHTS & THE NAT'L LAWYERS GUILD, THE JAILHOUSE LAWYER'S HANDBOOK 17 (5th ed. 2010), http://jailhouselaw.org [https://perma.cc/9MKH-LX5E] (citing case law enumerating various guarantees under the Eighth Amendment).

[14] *See* 18 U.S.C. § 3626(b)(1) (1997) (limiting injunctions to two years without a further showing of cause).

[15] *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121–22 (2009) (arguing that the Federal Tort Claims Act specifically preserves *Bivens* claims despite disallowing non-constitutional torts from being brought directly against federal officers).

[16] Ziglar v. Abassi, 137 S. Ct. 1843, 1843 (2017).

[17] *See* Carlson v. Green, 446 U.S. 14 (1980).

[18] *See infra* Part V(A).

[19] *See infra* Part V(B).

[20] *See* 42 U.S.C. § 1983 (2012) (providing a damage remedy to persons whose constitutional rights are violated by state actors).

people detained in federal prisons across the country. This comment explains how the formulation of the *Bivens* framework established by *Ziglar* excludes nearly every Eighth Amendment violation in federal prisons from being brought as a *Bivens* claim. This formulation is a break from previous *Bivens* jurisprudence and an unwise one—leaving federal prisoners without a direct damage remedy against officers who act unconstitutionally. These prisoners are therefore unable to adequately protect their Eighth Amendment rights.

I. HISTORY OF *BIVENS* EIGHTH AMENDMENT CLAIMS

A. ESTABLISHMENT OF THE *BIVENS* REMEDY AND EXTENSION TO EIGHTH AMENDMENT CLAIM

In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, Webster Bivens brought suit in federal court, claiming that federal agents had broken into his apartment, arrested him, and searched his home in violation of the Fourth Amendment.[21] He sought $15,000 in damages for the violation of his Constitutional rights, but the district court dismissed his claim for failing to state a cause of action.[22] The Second Circuit affirmed the district court, expressing significant doubt about the propriety of permitting causes of action flowing directly from the Constitution.[23]

The Supreme Court harbored no such doubts and held that a claim for damages could be implied directly from the text of the Constitution.[24] Justice Brennan, relying on the theory that for every violation of a right there is a remedy—and that the traditional remedy was money damages—concluded that violations of Constitutional rights by government actors must necessarily give rise to a claim for money damages.[25] Although they conceded that nothing in the Fourth Amendment's text explicitly provided for this interpretation, the Court nonetheless held that a remedy was available to redress Bivens' grievance.[26]

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[21] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

[22] *Id.* at 389–90.

[23] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 409 F.2d 718, 726 (2d Cir. 1969) ("Judicial recognition of private damage action under the Fourth Amendment would carry with it the responsibility for developing a body of federal common law . . . A federal court should not begin to travel down this long and uncertain road unless it is persuaded, as we are not, that the journey is essential to insure the vitality of a constitutional right.").

[24] *Bivens*, 403 U.S. at 396.

[25] *Id.*

[26] *Id.*

The Court extended the *Bivens* remedy to Eighth Amendment claims in *Carlson v. Green*.[27] *Carlson* was a lawsuit brought by Marie Green, the administratrix of Joseph Jones' estate.[28] She alleged that Jones, a chronic asthmatic and federal prisoner, had died after a severe asthma attack that had been grossly mishandled by prison medical staff.[29] She further alleged that these facts amounted to deliberate indifference to a serious medical need in violation of Jones' Eighth Amendment rights.[30] Though the lower courts focused primarily on whether an Indiana state survivorship law applied to defeat Green's action, the Supreme Court took a more holistic approach to considering the availability of a *Bivens* claim.[31]

The Court began with the proposition that a *Bivens* claim should not be created to remedy a constitutional tort under two circumstances.[32] The first circumstance is when "special factors counsele[d] hesitation in the absence of affirmative action by Congress [permitting a *Bivens* action]."[33] The second is where a "defendant shows that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[34]

The Court found that neither of these considerations applied in this case.[35] While the Court spent only two sentences on dismissing special factors, they found a longer discussion appropriate with regard to alternative remedies.[36] Specifically, petitioners had raised the possibility that the Federal Tort Claim Act (FTCA) could provide an alternative remedy.[37] In rejecting the FTCA as an alternative remedy, the Court noted that the legislative history of the FTCA in no way indicated that Congress had intended to preempt a *Bivens* remedy.[38] While the original FTCA had long predated the Courts development of the *Bivens* remedy, comments from its 1974 amendment indicated that Congress "view[ed] FTCA and *Bivens* as parallel, complementary causes of action."[39]

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[27] Carlson v. Green, 446 U.S. 14, 14 (1980).
[28] *Id.* at 16.
[29] *Id.* at 16 n.1.
[30] *Id.* at 16.
[31] *Id.* at 17–18.
[32] *Id.* at 18.
[33] *Id.*
[34] *Id.* at 18–19.
[35] *Id.* at 19.
[36] *Id.* at 19–23.
[37] *Id.* at 19.
[38] *Id.* at 19–20.
[39] *Id.*

The Court emphasized the fact that the FTCA did not supplant a *Bivens* remedy by highlighting the ways in which a *Bivens* remedy provided more effective relief.[40] The Court first noted that certain trial rights, such as punitive damages and the right to a jury trial, were only available through a *Bivens* action.[41] More importantly, the Court emphasized the deterrent effect of having a claim for damages directly against an officer who acted unconstitutionally.[42] Finding no reason to refrain from creating a *Bivens* action for Green's Eighth Amendment claim, the Supreme Court affirmed the lower court's holding that Eighth Amendment claims could be vindicated in a *Bivens* action.[43]

In between *Bivens* and *Carlson*, the Court also recognized that a *Bivens* action exists for Fifth Amendment sexual discrimination claims.[44] To this day, the Supreme Court has not extended *Bivens* beyond the claims recognized in *Bivens*, *Carlson*, and *Davis*.[45]

B. EIGHTH AMENDMENT CLAIMS REMAIN STRONG DESPITE RETRENCHMENT OF *BIVENS*

After *Carlson*, the Court entered an era of reluctance, if not downright hostility, towards recognizing new *Bivens* claims. For the next two decades, the Court relied on special factors or sufficiently good alternative remedy schemes to reject *Bivens* claims brought under new amendments,[46] different clauses in accepted amendments,[47] or the same clause but in the context of military service.[48] However, despite the Court's reluctance to extend *Bivens*, it continued to allow Eighth Amendment *Bivens* claims.

For example, in *McCarthy v. Madigan*, the Supreme Court ruled that a prisoner was not required to exhaust prison administrative remedies before filing a *Bivens* action seeking only damages.[49] In coming to this

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[40] *Id.* at 20–21.

[41] *Id.* at 20–22.

[42] *Id.*

[43] *Id.* at 24.

[44] Davis v. Passman, 442 U.S. 228 (1979).

[45] Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017) ("These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.").

[46] *See* Bush v. Lucas, 462 U.S. 367 (1983) (rejecting a *Bivens* claim brought for violation of plaintiff's First Amendment rights).

[47] *See* FDIC v. Meyer, 510 U.S. 471 (1994) (rejecting a *Bivens* claim under the due process component of the Fifth Amendment rather than the equal protection component).

[48] *See* Chappell v. Wallace, 462 U.S. 296 (1983) (rejecting a *Bivens* claim for racial discrimination brought by enlisted navy man against commanding officer).

[49] McCarthy v. Madigan, 503 U.S. 140, 149 (1992).

conclusion, the Court considered the fact that Congress had not explicitly required exhaustion, the inability of the grievance procedure to provide monetary relief, or the onerous timetable for filing administrative claims—which the Court saw as a "likely trap for the inexperienced and unwary inmate."[50] While the majority recognized that requiring exhaustion prior to allowing a *Bivens* claim was certainly within their discretion, they refused to impose a requirement that would hamstring *Bivens* claims. Given that the Court had typically been unwilling to extend *Bivens* in the face of implicit congressional intent to require administrative action,[51] *McCarthy* seemed to stand out as a rare win for *Bivens*. Although the Prison Litigation Reform Act of 1996 would make *McCarthy* a moot point,[52] it at least stood for the proposition that the Court was not going to restrain existing *Bivens* claims without congressional action.

By 1994, it appeared that *Bivens* was a cemented part of the Supreme Court's jurisprudence. In *Farmer v. Brennan*, the entirety of the Court's discussion of the validity of bringing Farmer's claim under *Bivens* was a sentence explaining the procedural background of the case and string cites to *Bivens* and *Carlson*.[53] Although *Farmer*, like *Carlson*, involved a claim for deliberate indifference to a serious harm, the facts of *Farmer* could have at least plausibly required a *Bivens* analysis before reaching the merits.

Dee Farmer was a transsexual prisoner who, despite identifying as female, had been placed in a men's prison pursuant to a practice of housing prisoners by reference to their biological sex.[54] After a disciplinary transfer to a higher security prison, Farmer was placed in general population, where she was almost immediately sexually assaulted in her cell.[55] Farmer filed a *Bivens* claim against the prison warden, claiming that placing her in general population amounted to deliberate indifference to a serious risk of harm based on the history of inmate assaults and Farmer's unique vulnerabilities to being assaulted.[56] While Farmer's claim clearly fell under the same general prohibition—that prison officials not be deliberately indifferent to a risk of serious harm—as the claim in *Carlson*, it was unclear whether the

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[50] *Id.* at 152–54.

[51] *See, e.g.*, Bush v. Lucas, 462 U.S. 367 (1983) (rejecting *Bivens* claim where Congress had provided administrative mechanism for resolving plaintiff's claim).

[52] *See, e.g.*, Garrett v. Hawk, 127 F.3d 1263 (10th Cir. 1997) (noting that the PLRA had overruled *McCarthy* by expressly requiring exhaustion of administrative remedies).

[53] Farmer v. Brennan, 511 U.S. 825, 830 (1994).

[54] *Id.* at 829.

[55] *Id.* at 829–30.

[56] *Id.* at 830–31.

Court had meant for *Carlson* to include all of the permutations of this broad prohibition.[57]

The Court in *Carlson* noted that a "special factor" which could preclude a *Bivens* claim included whether such claims "might inhibit [prison officials'] efforts to perform their official duties."[58] Requiring prison officials to respond adequately to medical emergencies properly was clearly unlikely to do so, as providing medical care is one of their affirmative duties. However, requiring them to consider a prisoner's unique vulnerabilities in every administrative decision, while mandated by the Eighth Amendment, could also impose significant constraints on an official. Despite the colorable argument that *Farmer* raises different considerations than *Carlson*, the Court's opinion declined to engage in even a cursory *Bivens* analysis and instead accepted Farmer's *Bivens* claim as valid with hardly a thought.[59]

Thus, although *Farmer's* substantive holding was injurious to prisoner rights, [60] it was at least procedurally a win for *Bivens*. What was unclear was how broadly *Farmer*'s affirmance of the *Bivens* remedy extended. Although not conclusively answering this question, the Court soon delineated other boundaries for *Bivens* actions claiming violations of a prisoner's Eighth Amendment rights.

C. EIGHTH AMENDMENT CLAIMS REJECTED FOR PRIVATE PRISONS

First, in 2001, the Court considered the interaction between *Bivens* claims and a new prison paradigm, privately managed prisons. In *Correctional Services Corp. v. Malesko*, John Malesko attempted to bring a *Bivens* claim against a privately operated federal halfway house.[61] The

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[57] It is notable that nearly all of the cases that the Court cites in sketching out the prohibitions of the Eighth Amendment in *Farmer* are cases that were decided after *Carlson*. *See* Farmer, 511 U.S. at 832–33 (explaining the protections afforded to prisoners by the Eighth Amendment) (citing Helling v. McKinney, 509 U.S. 25 (1993); Hudson v. McMillian, 503 U.S. 1 (1992); Hudson v. Palmer, 468 U.S. 517 (1984)). The only case from the pre-*Carlson* era is *Estelle v. Gamble*, which makes it unconstitutional for prison officials to be deliberately indifferent to serious medical needs. Estelle v. Gamble, 429 U.S. 97 (1976). Thus, *Farmer* can be read optimistically as a deliberate choice to extend *Bivens* to the naturally evolving protections of the Eighth Amendment, or pessimistically as an oversight.

[58] Carlson v. Green, 446 U.S. 14, 19 (1980).

[59] The only discussion of *Bivens* in *Farmer* is a single sentence and a string cite to the Court's previous *Bivens* cases. *See* Farmer v. Brennan, 511 U.S. 825, 830 (1994) ("[P]etitioner then filed a *Bivens* complaint, alleging a violation of the Eighth Amendment").

[60] *Farmer*, 511 U.S. at 837 (holding that deliberate indifference required a showing of criminal, not civil, recklessness).

[61] Corr. Serv. Corp. v. Malesko, 534 U.S. 61, 64 (2001).

halfway house had implemented a policy requiring people housed below the sixth floor to use the stairs to reach their rooms.[62] Malesko lived on the fifth floor, but was exempted from the policy due to a heart condition.[63] His claim alleged that despite this exception, a Correctional Services Corp. employee had forced him to take the stairs, causing him to have a heart attack, fall, and severely injure his ear.[64]

Although accepting that Malesko's pleading amounted to an Eighth Amendment violation, the Supreme Court expressed hesitance in extending *Bivens* claims to a "new category of defendants."[65] The Court relied on three rationales in declining to create liability for private entities under *Bivens*. Foremost, the Court was concerned that entity liability undercut *Biven's* goal of deterring "individual federal officers from committing constitutional violations" while also creating a "potentially enormous financial burden" on the entities.[66] Additionally, the Court noted that prisoners in public penitentiaries did not have a right to sue the Bureau of Prisons (BOP) and that allowing private prisoners to sue federally contracted corporations would create awkward incongruities between public and private institutions.[67] Lastly, the Court noted that persons in private detention facilities had alternative avenues of relief available to them.[68] Not only did they have the normal channels of the BOP's Administrative Remedy Program, but they could also bring state law tort claims which were not barred by sovereign immunity.[69] While neither of these remedies standing alone had impressed the Court in the past as an alternative to *Bivens*,[70] taken together they seemed to alleviate the Court's concerns about the ability of prisoners to obtain meaningful relief.

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[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 68.

[66] *Id.* at 70.

[67] *Id.* at 71–72.

[68] *Id.* at 72–73.

[69] *Id.* at 72–74.

[70] *See* McCarthy v. Madigan, 503 U.S. 140, 153 (1992) (characterizing the BOP's grievance procedure as a "trap for the inexperienced and unwary litigant"); *see also* Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 390 (1971) (rejecting tort law as a feasible mechanism for relief in constitutional tort claims). Though the Court attempts to distinguish this case from *Bivens*, their argument potentially rests on the false assumption that all violations of the Eighth Amendment are cognizable in tort. *See* Minneci v. Pollard, 565 U.S. 118, 130–31 (2012) (considering it plausible that some Eighth Amendment claims may not be covered by state tort law).

Although the majority of the Court refused to extend *Bivens* to include entity liability, Justice Scalia, joined by Justice Thomas in concurrence, took a far more hostile approach to *Bivens*.[71] Justice Scalia branded *Bivens* as a "relic of the heady days in which the Court assumed common-law powers to create causes of action," an exercise in "invent[ing] implications" that the Court had subsequently abandoned in at least the statutory field.[72] Justice Scalia advocated similar abandonment in the Constitutional field because an "implication imagined in the Constitution can presumably not even be repudiated by Congress."[73] His solution was to "limit *Bivens* and its two follow-on cases [*Davis* and *Carlson*] to the precise circumstances that they involved."[74]

Although Scalia's position did not garner more votes than it had in *Malesko*, the number of justices willing to decline an extension of *Bivens* rose to eight in *Minneci v. Pollard*.[75] *Minneci*, like *Malesko*, involved a suit brought by a prisoner housed in a privately operated prison.[76] Unlike *Malesko*, the claim was brought directly against officers of the facility rather than against the corporate entity.[77] Pollard, who had fractured both of his elbows in an accident, alleged that various officials had been deliberately indifferent in both treating and accommodating his serious injury.[78] Although Pollard's claim did not share the same risk of "enormous liability" that concerned the Court in *Malesko*, it still bore one key similarity: the corporate nature of the defendant, which meant state tort suits were not barred by sovereign immunity.[79]

Since Pollard's allegations were within the scope of tort law, the Court concluded that he had an alternative process for effectively vindicating his constitutional claim.[80] As such, it held that no *Bivens* remedy should be extended to Pollard's claim, though it left open the possibility that an Eighth Amendment violation not cognizable in state tort law may provide a feasible *Bivens* claim against a private prison official.[81] Justice Scalia,

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[71] *Malesko*, 534 U.S. at 75 (Scalia, J., concurring).
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] 565 U.S. 118 (2012).
[76] *Id.* at 121.
[77] *Id.*
[78] *Id.* at 121–22.
[79] *Id.* at 126–27.
[80] *Id.*
[81] *Id.* at 130–31.

joined again by Justice Thomas, concurred for nearly identical reasons as in *Malesko*.[82]

Despite Scalia's concurrence to the contrary, the Court's post-*Minneci* Eighth Amendment thinking seemed to break down into two parts. On the one hand, the Court consistently refused to extend the *Bivens* remedy created by *Carlson* outside of claims brought by federal prisoners against public prison officials. In contrast, within the public prison claim space, the Court at least implicitly accepted that all forms of Eighth Amendment violations were cognizable as *Bivens* claims.[83] This dichotomy was accepted by lower courts, who unhesitatingly extended *Bivens* claims to the entire constellation of Eighth Amendment protections.[84] Further, even those prisoners who were incapable of asserting *Bivens* claim due to being held in private federal prisons could bring state tort claims, which some scholars have posited is equal or perhaps even preferable to having a *Bivens* claim available.[85] The upshot was that post-*Minneci*, nearly every Eighth Amendment violation in federal prison was redressable through either *Bivens* or state tort law.[86] However, the Supreme Court has put the continuing availability of a damages remedy for many Eighth Amendment violations in doubt with their decision in *Ziglar v. Abbasi*.[87]

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[82] *Id.* at 131–32 (Scalia, J., concurring).

[83] *See* Farmer v. Brennan, 511 U.S. at 832–35 (discussing the various protections that are embodied by the Eighth Amendment). Although the Supreme Court does not say that violation of these protections could be cognized as a *Bivens* claim, their ready acceptance of Farmer's claim, which is substantively different than the claim at issue in *Carlson*, seems to support the idea that all Eighth Amendment protections can be vindicated through a *Bivens* claim. Further, the Supreme Court has never subjected an Eighth Amendment claim to alternative remedies and special factors scrutiny merely because it sought protection of a different Eighth Amendment protection.

[84] *See, e.g.*, Burke v. Bowns, 653 F. App'x. 683 (11th Cir. 2016) (allowing a *Bivens* claim for alleged use of excessive force); Walker v. Schult, 717 F.3d 119 (2d Cir. 2013) (*Bivens* appropriate means for challenging conditions of confinement); Robinson v. Norwood, 535 F. App'x. 81 (3rd Cir. 2013) (punishment without due process).

[85] *See* Alexander Volokh, *Keynote Article: The Modest Effect of* Minneci v. Pollard *on Inmate Litigants*, 46 AKRON L. REV. 287, 293–94 (2013) (arguing that state tort law may be preferable to *Bivens* for certain claims given lower burdens of proof and availability of respondeat superior liability).

[86] The qualifier "nearly" is used because the Supreme Court in *Minneci* left open the question whether an Eighth Amendment claim by a prisoner in a private facility that was not cognizable in tort could be brought as a *Bivens* claim. *See* Minneci v. Pollard, 565 U.S. 118, 130 (2012).

[87] 137 S. Ct. 1843 (2017).

D. *ZIGLAR* AND THE REWORKING OF THE *BIVENS* FRAMEWORK

Although *Ziglar* certainly has serious implications for prisoner rights litigation, it involved the assertion of rights by persons detained in an entirely different context. Ahmer Iqbal Abbasi, along with many others, were detained for several months on a "hold-until-cleared policy" following the 9/11 attacks.[88] During their detention, they were allegedly subjected to harsh conditions of confinement[89] and violence from guards.[90] Following their release, they brought claims against the Attorney General, the FBI Director, the Immigration and Naturalization Service Commissioner, and the wardens of the facilities where they were detained.[91] The Second Circuit permitted their claims to go forward. In doing so, it relied on the fact that the claims were not "new" *Bivens* claims, and thus did not require consideration of alternative remedies or special factors that may counsel against extending *Bivens*.[92] In finding that the claim was not new, the Second Circuit looked at two things: (i) whether the right injured was the same as in a previous *Bivens* case, and (ii) whether the mechanism of injury to that right was the same as in a previous *Bivens* case.[93] Considering the claim as an allegation that "individual officers violated detainees' constitutional rights by subjecting them to harsh treatment with impermissible intent," it found that the claim "[stood] firmly within a familiar *Bivens* context."[94] This rights-mechanism analysis of novelty by the Second Circuit was vehemently rejected by the Supreme Court.[95]

The Supreme Court opted for a test of novelty that would render nearly any claim not on the exact facts of one of the original three *Bivens* cases new. In providing a non-exhaustive list of examples of what could create a new *Bivens* context, the Court elaborated that novelty would be found, at a minimum, in situations that differed in

> [R]ank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or legal mandate under which the officer was operating; the risk of disruptive

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[88] *Id.* at 1852.

[89] *Id.* at 1853 (prisoners were held in constantly lit, tiny cells for over 23 hours a day, denied basic hygiene products, and denied most communication with the outside world).

[90] *Id.* ("Guards allegedly slammed detainees into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion.").

[91] *Id.*

[92] *See* Turkmen v. Hasty, 789 F.3d 218, 234–37 (2d Cir. 2015).

[93] *Id.* at 234–35.

[94] *Id.* at 235.

[95] *Ziglar*, 137 S. Ct. at 1859–60.

> intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.[96]

These considerations are weighed against the "three *Bivens* claims the Court has approved in the past"—*Bivens*, *Davis*, and *Carlson*.[97] Notably, the Court's test for considering whether a *Bivens* claim is "new" is itself a novelty, bearing no citation to any previous *Bivens* case law.

Applying their novelty test, the majority concluded, unsurprisingly, that the context of Abbasi's claim was new.[98] Having found novelty, the Supreme Court continued forward into a consideration of special factors.[99]

Here, the inquiry was framed as whether special factors precluded claims against high-ranking executive officials, the detention center wardens, or both.[100] The Court first enumerated several special factors in rejecting the availability of a *Bivens* remedy against the various high ranking executive officials responsible for creating the detention policy.[101] Concluding that allowing judicial intrusion into matters of national security policy would create serious separation of powers issues, the Court held that absent express Congressional approval, a *Bivens* action against those who formulated the detention policy was unavailable.[102]

However, those same factors did not apply to defeat the *Bivens* claims against the wardens. Although ultimately remanding the final special factors analysis for these claims to the court of appeals, the Supreme Court nevertheless provided some reasons why a *Bivens* remedy may not be available.[103] The upshot is that although *Bivens* on the surface retains its two-part inquiry, the inquiries are no longer completely distinct. The presence of special factors counseling hesitation—previously addressed after a finding of novelty—has become a means for finding novelty in the first place.[104] This conflation, though confusing, is far less troubling than what the Court considered as special factors.

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[96] *Id.* at 1860.

[97] *Id.* (Interestingly, although the Court describes the facts of *Carlson*, it cites to *Chappell v. Wallace*, 462 U.S. 296 (1983), a case where the Court had rejected a *Bivens* claim for racial discrimination arising in the military context).

[98] *Id.*

[99] *Id.* at 1860–64.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 1865.

[104] *Id.* at 1870.

II. THE NEW TEST UNDER *ZIGLAR* AND THE EVISCERATION OF *BIVENS*

Despite ultimately remanding the special factors analysis of a *Bivens* claim against the wardens to the Second Circuit, the Supreme Court noted several special factors counseling hesitation for the Second Circuit to consider.

First, the Court considered that *Carlson* involved clear guidance to prison officials that they were not supposed to be "deliberate[ly] indifferen[t] to serious medical needs" given that standard had been established by the Supreme Court five years earlier in *Estelle v. Gamble*.[105] In contrast, the standards for when a warden could allow guards to abuse pre-trial detainees was "less clear under the Court's precedents" and therefore could potentially counsel hesitation before being the basis of a *Bivens* claim.[106] However, as the Court acknowledges later in the opinion, lack of guiding law forms the basis for a qualified immunity defense to a *Bivens* action.[107] Given that officers can already raise this defense, and could when *Bivens* was decided,[108] it makes little sense to consider it as a bar to a *Bivens* claim.

Additionally, the majority found that the alternative remedies in the form of habeas corpus or an injunction may be sufficient to displace a *Bivens* remedy.[109] In doing so, it cited to four cases—*Bush*, *Schweiker*, *Malesko*, and *Minneci*—where plaintiffs had alternative means for obtaining not merely any relief, but money damages.[110] Here, a denial of a *Bivens* claim would leave the prisoners with no money damages claim, and thus with an entirely different alternative remedy than the plaintiffs in the aforementioned cases.

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[105] *Id.* at 1864; Estelle v. Gamble, 429 U.S. 97, 104 (1976).

[106] *Ziglar*, 137 S. Ct. at 1864–65.

[107] *Id.* at 1866 ("[A]n official loses qualified immunity only for violating *clearly established* law . . . .") (emphasis added).

[108] After the changes to the qualified immunity inquiry in *Pearson v. Callahan*, 555 U.S. 223, 230 (2009) (allowing defendant more flexibility in asserting qualified immunity), it is in fact easier to assert that a right was not clearly established. This should militate in favor of *Bivens*—since there is significantly less cost to defend on qualified immunity—rather than against the *Bivens* claim.

[109] *Ziglar*, 137 S. Ct. at 1865.

[110] See Schweiker v. Chilicky, 487 U.S. 412, 417 (1988) (money damages available through administrative proceeding); Bush v. Lucas, 462 U.S. 367, 371 (1983) (same); See also Minneci v. Pollard, 565 U.S. 118, 129 (2012) (state tort claim available); Corr. Serv. Corp. v. Malesko, 534 U.S. 61, 73 (2001) (same).

The Court's last consideration in the special factors analysis is the legislative history of the Prison Litigation Reform Act (PLRA).[111] The Court noted that this Act contains no "standalone damages remedy against federal jailers."[112] It construed this absence as creating an argument that "Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment."[113]

However, few clauses from the PLRA relate in any way to damages. Those that do provide that no recovery can be had for mental or emotional injury without a prior showing of physical injury or a sexual act.[114] Another clause prescribes that a percentage of money judgments will be used to satisfy attorney's fees.[115] While both of these provisions certainly add caveats to awards of monetary damages, neither seems to preclude a particular class of damage award from being granted.

Additionally, the rules of the PLRA apply not only to *Bivens* actions, but to actions brought under 42 U.S.C. § 1983, constitutional tort claims brought against state actors; actions which Congress certainly did not intend to limit to solely *Carlson*-style claims for deliberate indifference to medical needs.[116] While the PLRA may support an inference of Congress's hostility to claims brought by prisoners generally, it certainly does not seem to differentiate amongst those claims in any way meaningful to a *Bivens* analysis.

By the time the Court remanded Abbasi's claim against the wardens to the Second Circuit, they had essentially set up an entirely new *Bivens* framework.[117] In doing so, the majority not only eviscerated any hope of future extensions of *Bivens*, but also imposed impassable hurdles to prisoners seeking to remedy violations of many Eighth Amendment rights thought to exist under the former *Bivens* regime by providing lower courts with a number of new tools for rejecting a prisoner's *Bivens* claim. This new test likely means that claims for violations of Eighth Amendment

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[111] *Ziglar*, 137 S. Ct. at 1865.

[112] *Id.*

[113] *Id.*

[114] *See* 42 U.S.C. § 1997e(e) (1997).

[115] *Id.* at § 1997e(d)(2).

[116] *See* 42 U.S.C. § 1983 (2012) (subjecting to liability any person who causes a "deprivation of *any* rights, privileges, or immunities secured by the Constitution . . . .") (emphasis added).

[117] *Ziglar*, 137 S. Ct. at 1865.

rights other than ones identical to those asserted in *Carlson*[118] will fail at the special factors portion of the renovated *Bivens* analysis.

III. EIGHTH AMENDMENT *BIVENS* CLAIMS POST-*ZIGLAR*

The aftermath of the *Ziglar* decision drastically altered two parts of the *Bivens* framework. First, there is the initial question of whether a *Bivens* claim arises in a new context and thus mandates inquiry into alternative remedial schemes and special factors. Post-*Ziglar*, nearly every claim that is not extremely similar to *Carlson v. Green* is likely subject to this analytical gauntlet.[119] At the Supreme Court level, no claim deemed novel has ever succeeded post-*Carlson*, and this trend is likely to continue, especially with the Court's extensive special factors dicta.[120]

While the Court focused on providing reasons for the Court of Appeals to hesitate in granting Abbasi's *Bivens* claim for pre-conviction detention abuses, much of it was applicable to prisoners seeking relief for claims under the Eighth Amendment. The Court's explanation of the meaning of the PLRA, of the availability of injunctive relief, and of judicial guidance for jailers are readily deployable by a lower court seeking to reject a *Bivens* claim brought by a federal prisoner. The combined negative effect of these two changes can perhaps be seen by considering whether a *Bivens* claim would have been available for the plaintiff in *Farmer v. Brennan*, a landmark case which at the time was readily accepted as a valid, non-novel *Bivens* claim. As previously noted, the argument for the *Farmer* decision being an improper extension of *Carlson* was "colorable"[121] under the Court's new *Bivens* framework, that argument is ironclad.

Under the *Ziglar* test, the *Farmer* claim certainly presents a new context when compared to *Carlson*. Of the seven considerations enumerated by the Court, *Farmer* falls under at least three: (i) extent of judicial guidance available to officers in appropriately housing a transsexual prisoner; (ii) risk of disruptive intrusion of allowing the judiciary to consider administrative policies of prison officials for undue

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[118] Christian Patrick Woo, Comment, *The "Final Blow" to* Bivens*? An Analysis of Prior Supreme Court Precedent and the* Ziglar v. Abbasi *Decision*, 43 OHIO N.U. L. REV. 511, 549 (2017) (concluding claims not on the *exact* same facts as *Carlson* are probably no longer cognizable under *Bivens*); *Constitutional Remedies*—Bivens *Actions*—Ziglar v. Abbasi, 131 HARV. L. REV. 313, 313 (2017) (arguing that for the sake of candor the Court should "hold that the *Bivens* cause of action is limited to the facts of *Bivens*, *Davis*, and *Carlson*.").

[119] *Ziglar*, 137 S. Ct. at 1865 (noting that for differences not to be considered novel, they must be "trivial").

[120] *Id.*

[121] *See supra* Section B.

risks; and (iii) the presence of unconsidered special factors given the Court's complete overhaul of special factors would certainly militate in favor of novelty. Even if these were not sufficient, the *Ziglar* test provides an open invitation for lower court judges to use creativity in deciding whether a case "is different in a meaningful way."[122] Finding that the context of Farmer's *Bivens* claim was novel, a court would then move on to consider whether special factors or alternative remedies displaced a *Bivens* claim.

The Court's opinion in *Ziglar* also provides two ready reasons that a lower court could decline to "extend" *Bivens* to the facts of *Farmer* due to the presence of special factors or alternative remedies. First, the Court's emphasis that the availability of prospective relief such as an injunction is sufficient to offset *Bivens* and will almost always be a reason to reject a *Bivens* claim. However, in accepting injunctive relief as a suitable proxy for *Bivens* relief, the Supreme Court implies that it is sufficient to simply fix an ongoing constitutional violation even if that relief does not stop the harm from happening in the first place. Certainly, Farmer could have attempted to obtain an injunction preventing the warden from requiring her to remain amongst the general population where she remained at high risk of sexual assault. Even setting aside the timing issues of obtaining injunctive relief to avert a significant risk of serious harm, under the Court's reasoning, this "relief" is enough to refuse her any claim against the warden for the fact that she had already been raped.

Were this cynical perspective on remedies not sufficient, the Court also notes that the PLRA may provide an inference of Congressional intent towards limiting Eighth Amendment *Bivens* claims to those seeking damages for failure to provide adequate health care. A court could readily follow this "arguable" line of reasoning into a rejection of Farmer's claim for relief. Thus, applying the Court's test in *Ziglar* retroactively highlights what a confused break from precedent it is. Landmark cases go from accepting the availability of a *Bivens* remedy without comment to declining to provide necessary relief for the violation of prisoner's rights.

IV. WHY EIGHTH AMENDMENT *BIVENS* RELIEF IS NECESSARY

To understand why a damages remedy is necessary for enforcing Eighth Amendment rights in the federal prisons context, it is necessary to look at the animating concerns behind the creations of the original *Bivens* remedies, as well as the way the court has balanced those concerns against competing values such as separation of powers.

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[122] *See Ziglar*, 137 S. Ct. at 1859–60.

In its original formulation in *Bivens v. Six Unknown Agents*, the *Bivens* remedy was premised on three ideas: (i) the constitution provided meaningful rights to citizens and placed restraints on the government; (ii) the Courts of the United States are empowered with discretion in designing remedies that properly allow those rights to be vindicated; and (iii) where a damages remedy is "necessary or appropriate" for vindicating those rights one will be provided to a litigant claiming a constitutional violation.[123] In ascertaining whether compensatory relief was necessary and appropriate, the Court primarily focused on the deterrent effect that money damages has on officer misconduct.[124]

This emphasis on deterrence has also been evidenced when delineating the exact scope of the *Bivens* remedy. In *Carlson*, the question was raised whether the FTCA, a statute allowing recovery against the US for certain torts committed by federal officials, could offset a *Bivens* remedy.[125] Answering in the negative, the Court noted that the recovery against individuals provided a deterrent effect not provided by the FTCA, where recovery could only be had against the US more generally.[126] Another question raised by *Carlson* was whether a *Bivens* claim brought by the next of kin relied on state survival actions for validity.[127] In finding that the survival of a *Bivens* claim was dictated by federal law, the Court affirmed the appellate court which had stated that application of the state survival law would create the perverse incentive of making it "more advantageous to a tortfeasor to kill rather than to injure."[128]

The interest in avoiding perverse incentives to violate constitutional rights clearly shaped the initial scope of the *Bivens* doctrine. However, after *Carlson*, the Court has never extended *Bivens* to a new claim. Despite reticence in recognizing new *Bivens* claims, all of the Court's refusals to extend *Bivens* are explainable by considerations as to whether a damage remedy directly under the Constitution was necessary in order to deter further federal lawlessness.[129]

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[123] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 402–08 (1971).

[124] *Id.* at 407–08; *see also* Corr. Serv. Corp. v. Malesko, 534 U.S. 61, 62 (2001) ("*Bivens'* purpose is to deter individual federal officers . . . .").

[125] Carlson v. Green, 446 U.S. 14, 19 (1980).

[126] *Id.* at 21.

[127] *Id.* at 23.

[128] *Id.* at 18.

[129] Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (listing the Supreme Court cases in which the Court declined to extend a *Bivens* cause of action).

Most of these cases—*Bush*,[130] *Schweiker*,[131] *Meyer*,[132] *Malesko*,[133] and *Minneci*[134]—are situations where the Court declined to extend *Bivens* because the plaintiffs had available alternative forms of obtaining monetary relief directly against the offending officer or agency. While these alternative remedies may not provide equivalent compensation for the plaintiff,[135] provision of any money damages remedy directly against the offender serves the deterrence function and thus justifies the Court's decision to not create a largely redundant compensatory or deterrent remedy.

Another two of these cases, *Chappell v. Wallace*[136] and *U.S. v. Stanley*,[137] involved constitutional claims relating to the military. In both cases, the Court recognized the unique constitutional relationship between the military and the various branches of government.[138] Clearly aware of the unique separation of powers concerns that counsel judicial deference—if not judicial abstention—in military affairs, the Court stayed its hand instead of extending a *Bivens* remedy. Thus, these decisions do not reflect the Court's consideration of deterrence values because they instead represent the Court's awareness that military conduct is not theirs to promote or deter.

The last case, and possibly the strangest, is *Wilkie v. Robbins*—which attempted to combine a series of discrete forms of government harassment into a single *Bivens* claim.[139] *Wilkie* involved a suit brought against the Bureau of Land Management for various harassing tactics they utilized in an attempt to force Robbins to provide them with an easement across his property.[140] Robbins attempted to unify this patchwork of offenses into a single constitutional claim located somewhere at the intersection of the

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130 Bush v. Lucas, 462 U.S. 367 (1983).

131 Schweiker v. Chilicky, 487 U.S. 412 (1988).

132 FDIC v. Meyer, 510 U.S. 471 (1994).

133 Corr. Serv. Corp. v. Malesko, 534 U.S. 61 (2001).

134 Minneci v. Pollard, 565 U.S. 118 (2012).

135 *Schweiker*, 487 U.S. at 428 (rejecting an argument that because respondents have not been fully compensated for their injury the administrative scheme that the Court is deferring to is inadequate).

136 Chappell v. Wallace, 462 U.S. 296 (1983).

137 U.S. v. Stanley, 483 U.S. 669 (1987).

138 *Chappell*, 462 U.S. at 301 ("This case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.").

139 Wilkie v. Robbins, 551 U.S. 537 (2007).

140 *Id.* at 543.

Fourth and Fifth Amendments.[141] Though the Court found that Robbins had no alternative means of redressing his grievance, it declined to extend him a remedy, holding that standards for properly distinguishing between lawful and unlawful federal actions were simply unworkable.[142] Thus, *Wilkie* appears animated by the Court's fear of over-deterring government actions by extending a *Bivens* remedy.[143] This was because the Court, and arguably even the plaintiff—who brought his claim under two amendments—were unclear about which Constitutional right they were even attempting to vindicate.[144] This uncertainty additionally cautioned the Court from creating a situation where they were impermissibly limiting executive action for reasons outside of their *Bivens* role as protectors of constitutional rights.

Therefore, the Court's *Bivens* precedents prior to *Ziglar* can be explained by whether the Court felt: (1) A *Bivens* remedy was necessary to deter actions by the federal government that were violative of constitutional rights and (2) whether countervailing constitutional concerns such as separation of powers counseled against judicial interference in a particular case. Against this backdrop, the Court's decision to both create[145] and reaffirm[146] a *Bivens* remedy for Eighth Amendment violations allows us to at least begin with a presumption that a damages remedy is necessary for the adequate protection of Eighth Amendment rights.

V. INADEQUACY OF EIGHTH AMENDMENT REMEDIES WITHOUT A *BIVENS* CLAIM

This presumption of necessity is confirmed in the context of the Eighth Amendment because the remedies that remain when a *Bivens* remedy is removed inadequately protect Eighth Amendment rights. Without access to a *Bivens* claim, federal prisoners are left with three primary mechanisms for attempting to remedy violations of their Eighth Amendment rights. First, they must use the administrative mechanisms available through the BOP to seek relief for any claimed violation.[147] Second, they can bring a claim against the government, rather than the individual officer, vis-à-vis the

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[141] *Id.* at 548.

[142] *Id.* at 559–61.

[143] *Id.* at 562.

[144] *Id.* at 555–56 (noting that "there is a difficulty in defining a workable cause of action," and that Plaintiff's complaint was not based on an individual constitutional violation but based on "the course of dealing as a whole.").

[145] Carlson v. Green, 446 U.S. 14 (1980).

[146] Farmer v. Brennan, 511 U.S. 825 (1994).

[147] *See* 42 U.S.C. § 1997(e)(a) (DATE) (mandating exhaustion of administrative remedies prior to filing a claim in court).

FTCA.[148] Third, either alternatively or in conjunction with their FTCA claim, federal prisoners can seek injunctions in order to curtail ongoing violations.[149] However, without the opportunity to bring a *Bivens* claim, none of these remedies—alone or collectively—sufficiently protects Eighth Amendment rights.[150]

A. OTHER COMPENSATORY REMEDIES DO NOT PROVIDE OFFICER DETERRENCE

If prisoners are unable to bring a claim under *Bivens*, their remaining remedies do not provide them with a means to hold offending federal officers specifically accountable. A prisoner's mandatory first choice option for obtaining compensation is the internal grievance procedure of the prison itself.[151] This grievance system has onerous filing requirements,[152] and has been rightly characterized by the Supreme Court as a "trap for the . . . unwary."[153] Further, resolving prisoner grievances internally keeps them from litigating their claims in court and from exposing prison practices to the court of public opinion. Thus, even if the difficult procedural hurdles of the BOP grievance procedure remediate more claims than they cause to be forfeited; they do so in a way that avoids public censure and probably undercuts rather than promotes deterrence values. Further, since running the administrative gauntlet is a necessary precursor to seeking judicial relief, administrative relief is naturally conditioned by the risk faced by prison officials should a dissatisfied prisoner choose to file a lawsuit. Therefore, where that risk is minimized by inadequate judicial remedies, flaws with the grievance system are further magnified.

Without access to a *Bivens* claim, the only judicial remedy available to prisoners claiming a violation of their Eighth Amendment rights is the FTCA.[154] However, the Supreme Court has consistently held that allowing persons to sue an entity in place of an offender does not further the

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[148] *See* 28 U.S.C. § 1346(b)(1) (2013).

[149] *See* 18 U.S.C. § 3626 (DATE) (explaining procedures for obtaining injunctive relief for violations of prisoner rights).

[150] *See generally infra* pp. 29–33 (discussing insufficiency of alternative remedies for protecting Eighth Amendment rights currently secured by *Bivens* claims).

[151] *See* 42 U.S.C. § 1997e(a)(DATE) (requiring exhaustion of administrative remedies).

[152] *See generally* U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, 1330.13, CHANGE NOTICE (2002), *available at* https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison_and_Jail_Grievance_Policies/US_Bureau_of_Prisons_Policy.pdf [https://perma.cc/U99U-FZ85].

[153] McCarthy v. Madigan, 503 U.S. 140, 153 (1992) (rejecting grievance procedures as an adequate substitute for *Bivens* relief).

[154] *See* 28 U.S.C. § 1346(b)(1) (DATE).

deterrence function that lays at the core of *Bivens*.[155] In addition, the Supreme Court has expressly rejected the FTCA as a substitute for *Bivens* relief, noting its inferior procedural and remedial rights.[156] Lastly, both the Court and commentators have expressly found that the goal of the FTCA was not to supplant *Bivens*, but to provide a "parallel, complementary cause[] of action."[157] This view is borne out by the legislative history of the FTCA.[158] Thus, although the FTCA may function effectively as a compensatory remedy, giving access to the significantly deeper pockets of the U.S. government, it does not serve a deterrent purpose because it was intentionally designed to supplement, not supplant, a *Bivens* remedy in cases where Federal officers violate constitutional rights. Clearly, a remedy designed with the deterrence values of *Bivens* in mind does not provide an adequate remedy when that deterrence ceases to be available.

B. INJUNCTIVE RELIEF IS NOT A FEASIBLE MECHANISM FOR REMEDIATING ONGOING HARMS

The last remedy for Eighth Amendment violations is injunctive relief. Injunctive relief, however, will rarely serve a deterrence function. This is because injunctions are a prospective remedy, which prevents them from having anything more than marginal deterrence value.

Injunctions may be able to provide some relief at the margins, for instance in cases where prisoners claim they are exposed to significant risk of serious harm. At least theoretically, if an injunction is issued before the risk is realized, the harm may be avoided. Even in these cases injunctions remain problematic for three reasons. First and most importantly, prisoners have a constitutional right not to have prison officials be "deliberate[ly] indifferen[t] to a substantial risk of serious harm."[159] Therefore, without a retrospective component, the Eighth Amendment right is not protected for the entire time that a prisoner spends litigating an injunction. This time is especially significant, as often risks that rise to the level of constitutional violations will be realized prior to successfully litigating injunctive relief.

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[155] Corr. Serv. Corp. v. Malesko, 534 U.S. 61, 70 (2001) (explaining that entity liability does not deter individual officers); Carlson v. Green, 446 U.S. 14, 21 (1980) (noting the FTCA does not adequately fulfill the deterrence purpose of *Bivens*).

[156] *Carlson*, 446 U.S. at 21–23 (rejecting the FTCA as a *Bivens* substitute because Bivens provides access to punitive damages and trial by jury, rights not available under FTCA).

[157] *Id.* at 19–20; *see also* Pfander & Baltmanis, *supra* note 15.

[158] *See* S. REP. NO. 93-588, at 3 (1973) ("innocent individuals [subject to constitutional violations] will have a cause of action against Federal agents and the Federal government").

[159] Farmer v. Brennan, 511 U.S. 825, 828 (1994).

Such was the case in *Farmer*, where plaintiff, a transsexual prisoner was raped only two weeks after being placed in general population according to her birth—rather than her expressed—gender.[160] Because of this reality, even where injunctive relief is readily available, it will often remain ineffective to protect Eighth Amendment rights.

Second, the effectiveness of this relief is further strained by the fact that injunctive relief is significantly curtailed under the PLRA. Under the PLRA, prospective relief may not be granted unless a court finds "such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the federal right."[161] Finally, any injunctions that are granted may be terminated after two years.[162] As such, injunctions are an unfavorable mechanism for enforcing prisoner rights.

These provisions underscore the irony of the Court in *Ziglar* pointing to injunctive relief as an alternative remedy.[163] The Court's central rationale for not extending *Bivens* relief in *Ziglar* was to avoid separation of powers conflicts. In justifying its reticence to impose additional remedies on these actors the Court points to injunctions as a feasible way for plaintiffs to obtain relief for conditions of detention.[164] In doing so, it contravenes a congressionally established policy goal of avoiding injunctions as a means of remediating conditions of confinement. Thus, the Court pushes prisoners from utilizing a congressionally approved method,[165] towards a mechanism that is both a bad solution, and a solution that Congress has expressly disclaimed as in line with its policy goals.[166] Thus, the Court's "solution" for prisoners who are deprived of *Bivens* relief actually creates more conflicts with express congressional policies than a *Bivens* claim would.

C. OTHER REMEDIES DO NOT FULLY PROTECT EIGHTH AMENDMENT RIGHTS

The shortcoming of alternative remedies highlights the need for a direct damages remedy to incentivize prison officials to properly respect constitutional rights. Alternative damage remedies do not provide

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[160] *Id.* at 830.

[161] 18 U.S.C. § 3626(a)(1)(A) (2012).

[162] 18 U.S.C. § 3626(b)(1)(A)(i) (2012).

[163] Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017).

[164] *Id.* at 1865.

[165] S. REP. NO. 93-588, at 3 (1973).

[166] *See* 18 U.S.C. § 3626(a)(1) (2012) (placing limits on injunctive relief in prison condition litigation).

meaningful deterrence, providing relief only after the fact, while doing little to deter officers from committing offenses in the first place.

Protections obtainable outside of damages are significantly hampered by the Prison Litigation Reform Act, which severely curtails the ability of federal courts to provide injunctive relief with respect to prison litigation.[167] Various statutory limitations on injunctive relief hamstring equitable relief, as does the fact that in many cases, an injunction is simply an awkward way to frame relief. Taken together, prospective court orders do very little to fill the gap left if *Bivens* is eliminated. Limitations on an already imperfect form of relief make clear that a direct damages remedy for Eighth Amendment violations is absolutely necessary if the Eighth Amendment's protections are to be realized.

This function of damages as a necessary means for effectuating Eighth Amendment and other constitutional protections is left in serious doubt after the *Ziglar* decision. By inviting lower courts to reconsider the availability of damages for Eighth Amendment claims that differ even nominally from *Carlson*, and then by allowing them to foreclose relief even where no alternative means of obtaining direct money damages exist, the Supreme Court has created a framework wherein lower courts may abdicate their role of guaranteeing that constitutional rights are properly respected by federal officials.

D. A LACK OF JUDICIAL CANDOR MEANS THAT THE *BIVENS* GAP MAY NOT BE FILLED BY CONGRESS

The final issue created by the *Ziglar* opinion is that it does not curtail the availability of *Bivens* candidly, putting other institutions—primarily Congress—that many *Bivens* claims will no longer be feasible. By keeping the structure of the old *Bivens* two-part analysis, the Court makes it seem on the surface that little has changed in the *Bivens* doctrine. However, the reformulation of the substance of the test means that *Bivens* claims are now limited to facts similar, if not identical, to *Bivens*, *Carlson*, and *Davis*.[168]

By making this change without candidly acknowledging the goal of significantly limiting *Bivens* claims, the Court has not given proper notice to Congress, who is well positioned to fill the gap left by *Bivens*. Given that there is strong evidence that Congress approves of, and even relies upon,

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[167] *See* 18 U.S.C. § 3626 (2012).

[168] *See* Woo *supra* note 118.

the availability of a direct damages remedy against federal officers,[169] the Court's stealth elimination of much of the scope of *Bivens* means that it may be difficult to quickly fill the gap left by *Ziglar*. This is especially so because the group most significantly affected by this change, federal prisoners, has a weak presence in politics due to heavy disenfranchisement of incarcerated and formerly incarcerated persons.[170]

Justice Thomas, concurring in the *Ziglar* judgment, again took a hard anti-*Bivens* stance, labeling *Bivens* a "relic of the heady day in which this Court assumed common-law powers to create causes of action" and advocating "limiting *Bivens* and its progeny . . . to the precise circumstances that they involved."[171] Ironically, this two-paragraph lambasting of *Bivens* may have done a better job of protecting rights secured by *Bivens* than the majority's complex method of reaching substantively the same result. Had the Court clearly and emphatically stated that *Bivens* was dead, stakeholders could immediately begin seeking a replacement from other sources. Instead, we are left with Schrödinger's *Bivens*, uncertain if the doctrine retains any vitality at all until it begins to be applied by the lower courts. This uncertainty is an impermissible state for a person's constitutional rights.

CONCLUSION

Though the Supreme Court has historically acted cautiously in expanding the availability of *Bivens*, it has never failed to provide a *Bivens* remedy in order to deter federal officers where no other adequate mechanism existed. In doing so the Court has carved out a small but vital niche for *Bivens* in the context of prison litigation. The role of *Bivens* as the primary mechanism for deterring violations of Eighth Amendment rights by individual officers has been entrenched, not just by practice, but by legislation. Other remedies have evolved not to displace but to complement the direct damage remedy provided by a claim directly under the constitution. Due to this, *Bivens* has become critical in the Eighth Amendment context given its acceptance by all relevant actors.

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[169] See Pfander & Batlmanis, *supra* note 15 (legislative history of the FTCA evinces congressional opinion that Bivens and FTCA claims are "parallel and complementary" for ensuring rights).

[170] Ed Pilkington, *Felon Voting Laws to Disenfranchise Historic Number of Americans in 2012*, The Guardian, July 13, 2012, https://www.theguardian.com/world/2012/jul/13/felon-voting-laws-disenfranchisement [https://perma.cc/G62N-E75W] (estimating that nearly 6 million Americans would be disenfranchised in the 2012 election by various state laws).

[171] Ziglar v. Abbasi, 137 S. Ct. 1843, 1869 (2017) (Thomas, J., concurring in the judgment).

This remedial ecosystem was endangered by the Supreme Court in its decision in *Ziglar v. Abbasi*, which significantly reworked the framework for analyzing whether a *Bivens* claim was available with no attention paid to whether alternative remedial mechanisms would be able to fill the gap left if a *Bivens* remedy was not provided. By eschewing this methodology, the *Ziglar* Court has cast doubt on the continuing vitality of *Bivens* as a means for ensuring that violations of Eighth Amendment rights are vindicated properly—not merely through compensation, but also by deterrence. Without the deterrence provided by a Bivens remedy, federal prisoners are left with remedies that do an insufficient job of protecting Eighth Amendment Rights. As such, the Eighth Amendment rights of over one hundred thousand federal prisoners to second-class status as compared to their state counterparts.